RICHARD C. DARWIN (State Bar No. 161245)
COVINGTON & BURLING
One Front Street
San Francisco, California 94111
Telephone: (415) 591-6000
Fax: (415) 591-6091

E. EDWARD BRUCE
STUART C. STOCK
KEITH A. NOREIKA
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 662-6000
Fax: (202) 662-6291

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

BANK OF AMERICA, N.A.;
BANK OF AMERICA, N.A. (USA);
BANC OF AMERICA INVESTMENT SERVICES, INC.;
BANC OF AMERICA INSURANCE SERVICES, INC.;
WELLS FARGO BANK, N.A.;
WELLS FARGO BANK NEVADA, N.A.;
WELLS FARGO INSURANCE, INC.;
WELLS FARGO HOME MORTGAGE, INC.,

Plaintiffs,

versus

CONTRA COSTA COUNTY, CALIFORNIA;
JOHN M. GIOIA, Chair, Board of Supervisors;
GAYLE B. UILKEMA, Supervisor;
DONNA GERBER, Supervisor;
MARK DESAULNIER, Supervisor;
FEDERAL GLOVER, Supervisor;
JOHN W. SWEETEN, Clerk, Board of Supervisors;
SILVANO B. MARCHESI, County Counsel,

Defendants.

Civil Action No. C 02 4943 CW

FIRST AMENDED COMPLAINT FOR DECLARATORY RELIEF, PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION

1. This complaint seeks declaratory and injunctive relief to protect the federal rights of Bank of America, N.A., Bank of America, N.A. (USA), Banc of America Investment Services, Inc. ("BAI"), Banc of America Insurance Services, Inc. ("BAISI"), Wells Fargo Bank, N.A., Wells Fargo Bank Nevada, N.A., Wells Fargo Insurance, Inc. ("WFII"), and Wells Fargo Home Mortgage, Inc. ("WFHM") (collectively "Plaintiffs"),[1] under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681t(b)(2), the National Bank Act ("NBA"), 12 U.S.C. § 24(Seventh), the Gramm-Leach-Bliley Act of 1999 ("GLBA"), Pub. L. No. 106-102 (codified at 15 U.S.C. § 6701(d)), and the Supremacy Clause of the federal Constitution. In this action, Plaintiffs seek injunctive and declaratory relief that will allow them to use information, organize and operate notwithstanding Ordinance of Contra Costa County, Number 2002-30, enacted September 24, 2002 (the "Contra Costa Ordinance"), and amended by Ordinance Number 2002-44, enacted on November 5, 2002 (Exhibit A hereto).

2. The Contra Costa Ordinance is nearly identical to the County of San Mateo Ordinance that Plaintiffs are presently challenging in *Bank of America, N.A., et al. v. City of Daly City, et al.*, No. C 02 4343 CW (filed Sept. 10, 2002). The Contra Costa Ordinance prohibits Plaintiffs from sharing information about these customers among affiliates and with third parties, which assist Plaintiffs in offering their services, contrary to the rights conferred on Plaintiffs by the FCRA, NBA, and GLBA. Bank of America Plaintiffs do not share customer information with third parties that are neither affiliates, nor service providers for marketing purposes, unless the customer has consented. Wells Fargo Plaintiffs do not share customer information with third parties that are neither affiliates, nor service providers for marketing purposes unless the customer has consented, except that Wells Fargo Bank Nevada and WFII engage through joint agreements in the sale, solicitation and cross-marketing of insurance and

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[1] Bank of America, N.A. and Wells Fargo Bank, N.A. are collectively hereinafter referred to as "Plaintiff Banks" or "the Banks"; Bank of America, N.A. (USA) and Wells Fargo Bank Nevada, N.A. are collectively hereinafter referred to as "Credit Card Banks"; BAISI and WFII are collectively hereinafter referred to as "the Insurance Affiliates."

certain other products and services with third parties as authorized by GLBA, 15 U.S.C. § 6802(b)(2). The Contra Costa Ordinance is enforced by civil actions or administrative measures undertaken by local officials. The Contra Costa Ordinance becomes effective September 1, 2003.

Jurisdiction and Venue

3. This action is brought under the Supremacy Clause of the United States Constitution, the FCRA, NBA, GLBA, and 42 U.S.C. § 1983. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it arises under the Constitution and laws of the United States. In addition, jurisdiction is proper under 28 U.S.C. § 1343(a)(3), because Defendants, under color of state law, seek to deprive Plaintiffs of their federal constitutional rights. This Court is authorized to issue a declaratory judgment pursuant to 28 U.S.C. §§ 2201 & 2202.

4. Venue in this district is proper under 28 U.S.C. § 1391(b)(1) because Defendants reside in this district and under § 1391(b)(2) because all of the events and omissions giving rise to this case occurred in this district.

The Parties

5. Bank of America, N.A. ("Bank of America") is a national banking association organized and existing under the National Bank Act, 12 U.S.C. § 21 *et seq*. Bank of America operates numerous branches in California, as well as numerous branches in 21 other states and the District of Columbia. It maintains its main office in Charlotte, North Carolina, while its principal California office is in San Francisco. Bank of America has 2 branches in the unincorporated portion of Contra Costa County.

6. Bank of America, N.A. (USA), is a national banking association organized and existing under the National Bank Act, 12 U.S.C. § 21 *et seq*. Bank of America, N.A. (USA) markets its credit card products to customers, and potential customers of Bank of America including those in unincorporated Contra Costa County, and uses Bank of America's customer information to do so. Bank of America, N.A. (USA) maintains its main office in Phoenix, Arizona. It has no offices in unincorporated Contra Costa County.

7. BAI is an operating subsidiary of Bank of America pursuant to regulations of the Office of the Comptroller of the Currency ("OCC") issued under the National Bank Act. BAI solicits, sells, and markets securities and investment products to the existing customer base of the Bank of America franchise, including customers of Bank of America, such as those in unincorporated Contra Costa County, and uses Bank of America's customer information to do so. BAI has 2 offices in unincorporated Contra Costa County.

8. BAISI is a financial subsidiary of Bank of America pursuant to OCC regulations issued under the National Bank Act. BAISI solicits, sells, and markets insurance products to the existing customer base of the Bank of America franchise, including customers of Bank of America, such as those in unincorporated Contra Costa County, and uses Bank of America's customer information to do so. It has no offices in unincorporated Contra Costa County.

9. Wells Fargo Bank, N.A. ("Wells Fargo Bank") is a national banking association organized and existing under the National Bank Act, 12 U.S.C. § 21 *et seq*. Wells Fargo Bank operates numerous branches in California. Its affiliated national banks have numerous branches in more than 20 additional states. It maintains its main office and principal place of business in San Francisco. Wells Fargo Bank operates at least 1 branch in unincorporated Contra Costa County.

10. Wells Fargo Bank Nevada, N.A., is a national banking association organized and existing under the National Bank Act, 12 U.S.C. § 21 *et seq.* In addition to providing bank services to customers located in Nevada, Wells Fargo Bank Nevada markets its credit card products to Wells Fargo Bank customers, and potential customers, in unincorporated Contra Costa County, and uses Wells Fargo Bank's customer information to do so. Wells Fargo Bank Nevada also sells, solicits and crossmarkets insurance and certain other products and services through joint agreements with third parties as authorized by GLBA, 15 U.S.C. § 6802(b)(2). In doing so, it uses Wells Fargo Bank's customer information. Wells Fargo Bank Nevada maintains its main office in Las Vegas, Nevada. It has no offices in unincorporated Contra Costa County.

11. WFII is organized as a subsidiary of Wells Fargo & Company, the ultimate holding company of Wells Fargo Bank and Wells Fargo Bank Nevada. WFII solicits, sells, and markets insurance products to the existing customer base of the Wells Fargo franchise, including customers of Wells Fargo Bank in unincorporated Contra Costa County, and uses Wells Fargo Bank's customer information to do so. WFII also sells, solicits and crossmarkets insurance through joint agreements with third parties as authorized by GLBA, 15 U.S.C. § 6802(b)(2). In doing so, it uses Wells Fargo Bank's customer information. It has no offices in unincorporated Contra Costa County.

12. WFHM is organized as an operating subsidiary of Wells Fargo Bank pursuant to OCC regulations issued under the National Bank Act. WFHM solicits, sells, and markets mortgage products to the existing customer base of the Wells Fargo franchise, including customers of Wells Fargo Bank, such as those in unincorporated Contra Costa County, and uses Wells Fargo Bank's customer information to do so. WFHM has no offices in unincorporated Contra Costa County.

13. Defendant Contra Costa is an unincorporated organization located in the State of California. For purposes of the Ordinance at issue in this case, it exercises local government power under state law with respect to those portions of Contra Costa County that are unincorporated. For example, Concord is an incorporated city within Contra Costa County, and the Contra Costa County Ordinance would not apply to financial institutions located in Concord.

14. Defendant John M. Gioia is Chair of the Board of Supervisors of Defendant Contra Costa County. As such, he is a voting member of the Board of Supervisors.

15. Defendants Gayle B. Uilkema, Donna Gerber, Mark DeSaulnier, and Federal Glover are the remaining voting members of the Board of Supervisors of Defendant Contra Costa County.

16. Defendant John W. Sweeten is the Clerk of the Board of Supervisors of Defendant Contra Costa County. As such, he is the County official charged with taking the ministerial acts necessary for the Contra Costa Ordinance to become effective.

17. Defendant Silvano B. Marchesi is the County Attorney of Defendant Contra Costa County. As such, he is the county official charged with enforcing the municipal code of Contra Costa County, including the enforcement provisions of the Contra Costa Ordinance.

The Relevant Federal Statutory and Constitutional Provisions:
The Fair Credit Reporting Act

18. The FCRA, 15 U.S.C. § 1681 *et seq.*, defines the rights and obligations of banks, financial institutions and other corporations that receive, use, collect or exchange information regarding the creditworthiness of consumers and certain other consumer characteristics. Among other things, the FCRA expressly authorizes such institutions to exchange information with their affiliates regarding their experiences with their customers. For example, the FCRA allows financial institutions and other corporations to share information with affiliates, which they have derived from their dealing with their customers – so-called "experience information" – including information regarding those customers' "credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living." 15 U.S.C. § 1681m(b)(1). Moreover, the FCRA imposes no restrictions on the sharing of other information about customers – such as their names and addresses – that does not relate to creditworthiness or the above-quoted consumer characteristics.

19. The FCRA also allows such institutions to share information derived from other sources bearing on creditworthiness or relating to the consumer characteristics listed above – so called "non-experience information," for example, information derived from credit reports obtained from credit agencies – with their affiliates, provided that the institution gives the consumer notice and the opportunity to "opt out" of such non-experience information sharing before it occurs. The FCRA "opt out" allows a consumer to inform the institution that such "non-experience" information should not be shared by the institution with its affiliated corporate entities. 15 U.S.C. § 1681a(d).

20. The FCRA provides that "[n]o requirement or prohibition may be imposed under the laws of any State . . . with respect to the exchange of information among persons affiliated by common ownership or common corporate control . . . ." 15 U.S.C. § 1681t(b)(2). This provision expressly preempts state law that purports to regulate sharing between affiliates of any type of information relating to their customers. Section 1681t of the FCRA further provides that this preemption provision "do[es] not apply to any provision of State law (including any provision of a State constitution) that – (A) is enacted after January 1, 2004; (B) states explicitly that the provision is intended to supplement this subchapter [*i.e.*, the FCRA]; and (C) gives greater protection to consumers than is provided under this subchapter [*i.e.*, the FCRA]." 15 U.S.C. § 1681t(d)(2).

The National Bank Act

21. National banks are federally-chartered institutions created under, governed and exercising their authorized powers as granted by the National Bank Act, 12 U.S.C. § 21 *et seq*.

22. Under the National Bank Act, the OCC has exclusive regulatory, supervisory and enforcement authority with respect to national banks' provision of banking services. *See* 12 U.S.C. §§ 24(Seventh), 484(a).

23. Congress has authorized national banks "[t]o exercise . . . all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24(Seventh). These powers under 12 U.S.C. § 24(Seventh) include the authority to advertise and market the national bank's own products and services, as well as those of its affiliates, and to organize in the most efficient and effective form, including undertaking activities through operating subsidiaries and/or affiliates, *see*, *e.g.*, 12 C.F.R. § 5.34. National banks and their subsidiaries may also engage in authorized activities through joint marketing arrangements with nonaffiliated third parties.

24. The OCC has promulgated a regulation, 12 C.F.R. § 7.4006, making clear that national banks' operating subsidiaries enjoy the same preemptive protection of the National Bank Act as do their parent national banks.

Gramm-Leach-Bliley Act Privacy Provisions

25. Subtitle A of title V of GLBA provides a comprehensive federal scheme to regulate financial institutions' sharing of nonpublic personal information with affiliates and nonaffiliated third parties. *See* 15 U.S.C. § 6801 *et seq.* GLBA provides that financial institutions, like Plaintiffs, may not disclose nonpublic personal information to a third party unless it provides the customer with notice and an opportunity to opt out of such third-party information sharing. 15 U.S.C. § 6802(a) & (b)(1). GLBA provides, as a limited exception to its "opt out" requirement for sharing with nonaffiliated third parties, the ability to share with such third parties if it is pursuant to an "joint agreement," *i.e.*, an agreement with another financial institution to market jointly a product or service. *See* 15 U.S.C. § 6802(b)(2).

26. Like the FCRA, GLBA does not restrict a financial institution's sharing of information with its own affiliates. Moreover, Subtitle A of title V of GLBA provides that the GLBA "shall [not] be construed to modify, limit, or supersede the operation of the [FCRA]," 15 U.S.C. § 6806, and Subtitle A of title V of GLBA does not purport to affect the operation of the National Bank Act.

27. The annual notice to the consumer under GLBA must include the "financial institution's policies and practices with respect to . . . (1) disclosing nonpublic personal information to affiliates and nonaffiliated third parties . . .; (2) disclosing nonpublic personal information of persons who have ceased to be customers of the financial institution; and (3) protecting the nonpublic personal information of consumers." 15 U.S.C. § 6803(a). In addition, the notice must contain information "with respect to . . . the categories of persons to whom the information is or may be disclosed"; "the categories of nonpublic personal information collected by the financial institution," and "the disclosures required" for the customer to "opt out" of "non-experience" information sharing among affiliates contained in the FCRA, as described more fully above in paragraph 19.

Gramm-Leach-Bliley Act Insurance Preemption Provision

28. Section 104(d)(2)(A) of title I of GLBA provides that "[i]n accordance with the legal standards for preemption set forth in the decision of the Supreme Court of the

United States in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), no State may, by statute, regulation, order, interpretation, or other action, prevent or significantly interfere with the ability of a depository institution, or an affiliate thereof, to engage, directly or indirectly, either by itself or in conjunction with an affiliate or any other person, in any insurance sales, solicitation, or crossmarketing activity." 15 U.S.C. § 6701(d)(2)(A). Bank of America and Wells Fargo Bank are "depository institutions" within the meaning of 15 U.S.C. § 6701(d)(2)(A), and BAISI and WFII are "affiliates" of depository institutions within the meaning of 15 U.S.C. § 6701(d)(2)(A).

Supremacy Clause of the United States Constitution

29. Article VI of the United States Constitution provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Contra Costa Ordinance

30. The Contra Costa Ordinance was adopted after a second reading by the Contra Costa County Board of Supervisors on September 24, 2002, and its effective date was amended on November 5, 2002. It will now become effective on September 1, 2003. Contra Costa Amended Ordinance § III.

31. The Contra Costa Ordinance applies to any "financial institution," which "generally means any institution located in the unincorporated area of [Contra Costa] County that engages in financial activities." Contra Costa Ordinance § 518-4.414. Plaintiffs Bank of America and Wells Fargo Bank operate branches which lie within unincorporated Contra Costa County, and are thus subject to its Ordinance.

32. The Contra Costa Ordinance provides that "[a] financial institution shall not disclose to, or share a consumer's confidential consumer information with, any nonaffiliated third party or affiliate unless the financial institution has provided written notice to the consumer to whom the confidential consumer information relates and . . . has obtained consent acknowledgment signed by the consumer that authorizes the financial institution to disclose or

share the confidential consumer information [*i.e.*, a consumer 'opt in'].” Contra Costa Ordinance § 518-4.602(a). The imposition of restrictions on sharing information with affiliates is directly contrary to, and expressly preempted by, the FCRA which expressly permits such sharing. The Contra Costa Ordinance's “opt in” provision is also inconsistent and thus conflicts with the opt out provisions of the FCRA. The Contra Costa Ordinance defines the “consumer” to which it applies as “a consumer of a financial institution who resides in the unincorporated area of the County” (hereinafter “Contra Costa consumer” or “Contra Costa customer”). Contra Costa Ordinance § 518-4.410.

33. The “[w]ritten notices required by” the Contra Costa Ordinance must “include at least” “(1) The specific types of information that would be disclosed or shared, (2) The general circumstances under which the information would be disclosed or shared, (3) The specific types of persons or businesses that would receive the information, and (4) The specific proposed types of uses for the information.” Contra Costa Ordinance § 518-4.604(c). The Contra Costa Ordinance further provides that “[a] financial institution shall provide written notices and consent acknowledgements required by this [Ordinance] to consumers as separate written documents that are easily identifiable and distinguishable from other documents that otherwise may be provided to a consumer.” Contra Costa Ordinance § 518-4.604(b). The notice required by the Ordinance is more specific, and is likely to be required to be issued more frequently than, the notice required by the FCRA and GLBA.

34. Under the Ordinance, “[c]onfidential consumer information includes, but is not limited to, all of the following: (1) Information a consumer provides to a financial institution on an application to obtain a loan, credit card, or other financial product or service. (2) Account balance information, payment history, overdraft history and credit or debit card purchase information. (3) The fact that an individual is or has been a customer of a financial institution or has obtained a financial product or service from a financial institution.” Contra Costa Ordinance § 518-4.408(b).

35. The Contra Costa Ordinance in certain circumstances exempts licensed insurance agents and licensed securities broker-dealers from its notice and opt-in requirements.

Contra Costa Ordinance § 518-4.608. Plaintiff Banks are not so licensed and accordingly cannot avail themselves of this exception.

36. Under the Contra Costa Ordinance, a financial institution is liable for "administrative fines" for a violation of the Ordinance of up to $1,500 for each negligent violation of the Ordinance "irrespective of the amount of damages suffered by the consumer as a result of th[e] violation"; of up to $25,000 for each knowing and willful violation of the Ordinance; and of up to $250,000 for each knowing and willful violation of the Ordinance that results in financial gain to the financial institution (which is also subject to disgorgement). *Id.* § 518-4.610.

The Effect Of The Contra Costa Ordinance

37. The effect of an "opt-in" regime on financial institutions would be tantamount to a prohibition on information sharing about Contra Costa customers with both corporate affiliates and nonaffiliated third parties as otherwise authorized by applicable federal law. Very few individuals will take the time to opt-in to information sharing among corporate affiliates, even though they might otherwise benefit from such sharing in the form of more efficient and cost-effective financial services. By contrast, under the FCRA, information that the institution obtains from its own experience with a consumer regarding that individual's "credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living," 15 U.S.C. § 1681m(b)(1), can be shared without restriction among affiliates under the FCRA, as can other information, such as a customer's name, which does not relate to creditworthiness. Non-experience information bearing on creditworthiness or the above-quoted characteristics, such as information derived from credit reports, can be shared if notice is given to customers and they do not opt out of such information sharing, 15 U.S.C. § 1681a(d)(2).

38. Plaintiffs carry on their authorized activities in interstate commerce, as part of the nationwide banking, currency and credit system established by the NBA, 12 U.S.C. § 21 *et seq*. At significant costs – including, for example, the cost of drafting privacy notices under the GLBA, and implementing a consumer "opt out" regime under the GLBA and the

FCRA – Plaintiffs have each established and maintain for their respective organizations a centralized customer information sharing system among the Plaintiffs and their subsidiaries and affiliates to carry on their operations in the most efficient way possible. These centralized systems and databases were set up consistent with the requirements of the FCRA and are used by the Bank of America and Wells Fargo Plaintiffs, respectively, to provide account servicing for the Plaintiff Banks and all their affiliates, which for Wells Fargo includes the more than 20 other national banks that are located outside California. These coordinated systems are also used to provide marketing information to all of the Plaintiff Banks' affiliates. These systems cannot effectively be separated for use solely for the Plaintiff Banks' servicing and marketing activities. As part of this corporate organization, the Bank of America Plaintiffs and the Wells Fargo Plaintiffs and their respective subsidiaries and affiliates, operate as separate corporate entities but share customer information among themselves to serve their organization's customers better, promote their products and services, and earn profits. For example, each Bank uses its affiliated Credit Card Bank to market products, including debit cards issued by the Bank, to its own customers. These efficient allocations of responsibilities among the Banks' overall corporate organizations would be effectively prohibited by the Contra Costa Ordinance's opt-in requirements for all Contra Costa customers. Bank of America Plaintiffs do not share customer information with third parties that are neither affiliates, nor service providers for marketing purposes, unless the customer has consented; and Wells Fargo Plaintiffs do not share customer information with third parties that are neither affiliates, nor service providers for marketing purposes unless the customer has consented, except that Wells Fargo Bank Nevada and WFII engage through joint agreements in the sale, solicitation and cross marketing of insurance and certain other products and services with third parties as authorized by the GLBA, 15 U.S.C. § 6802(b)(2).

39. The Contra Costa Ordinance, if effective, would prevent all financial institutions, including Plaintiff Banks, from sharing any Contra Costa consumer confidential information among affiliates or with nonaffiliated third parties until and unless the consumer gives a written or electronic "opt in" consent. If it becomes effective, the Contra Costa

Ordinance may thereby force Plaintiff Banks to: (1) close their branches in unincorporated Contra Costa County, and thereby escape the limitations of the Ordinance; (2) cease offering products and services through affiliates and subsidiaries, and cease being able to have Plaintiff Banks' subsidiaries and affiliates offer the Banks' products and services, through the use of shared databases or otherwise, to Contra Costa customers; or (3) market products and services to Contra Costa customers that Plaintiff Banks would otherwise not offer if they could market the products and services more effectively and efficiently through their affiliates and subsidiaries.

40. The Contra Costa Ordinance's limited application to consumers residing in unincorporated Contra Costa County requires the Banks to determine exactly where their customers reside – for example, in Concord which is not part of unincorporated Contra Costa or in other locations that are. The Banks cannot easily separate out customers based on zip-codes or the like, because such easily defined markers cross the boundary between incorporated and unincorporated parts of the County.

41. Consistent with the FCRA and GLBA, Plaintiffs use their respective databases for the exchange of customer information with their affiliates. Even though the number of Contra Costa customers covered by the Ordinance is miniscule compared to all of the Plaintiffs' customers, Plaintiffs would be required to expend significant sums and effort to extract Contra Costa customers from the Plaintiffs' established data exchange practices and then to separately deal with them. The same is true of the separate notices that the Banks would have to prepare for Contra Costa customers.

42. The Contra Costa Ordinance will also affect the Credit Card Banks and WFHM. If the Ordinance becomes effective, the ability of the Credit Card Banks and WFHM, which are not located in unincorporated Contra Costa County, to market and sell their own products and services to Contra Costa customers and consumers would be curtailed or prevented because they could not continue to use Plaintiff Banks' customer databases.

43. Similarly, the effect of the Contra Costa Ordinance on the Insurance Affiliates would be significant. Presently, the Insurance Affiliates, which also are not located in unincorporated Contra Costa County, market and sell almost entirely to the existing customer

base of Plaintiff Banks and their affiliates. By preventing the Insurance Affiliates from accessing their parent and affiliated Banks' customer names and addresses the Insurance Affiliates' sales and marketing operations to Contra Costa customers would be curtailed.

44. The Contra Costa Ordinance would impair BAI's marketing activities, for example by preventing Bank of America from providing the names of its own Contra Costa customers to BAI absent an affirmative, written opt in to such consumer information sharing. The Ordinance would further prevent BAI from using its parent Bank's "experience information" with its customers in BAI's cross-marketing campaigns. Finally, the Ordinance would interfere with BAI's use of dual-employees, those who are employed both as bankers at Bank of America, while also operating as BAI sales employees.

45. The effect of the Contra Costa Ordinance would also be to prevent or interfere significantly with the ability of Wells Fargo Bank Nevada and WFII to engage in the sale, solicitation and crossmarketing of insurance and certain other products and services to Contra Costa residents through joint agreements authorized by 15 U.S.C. § 6802(b)(2).

46. The Contra Costa Ordinance's notice requirements would also cause further substantial injury to Plaintiff Banks. The Banks would have to create separate notices to comply with the Ordinance, which would have to be sent to Contra Costa customers as a separate stand-alone document. The Banks could not integrate this notice, or their standard annual notices required under federal law, with those of their affiliates as they now do. The specificity requirements of the Ordinance's notice provisions also would require the Banks to draft and sent to customers new notices on a more frequent basis than they do now for purposes of meeting the annual GLBA notice requirement.

47. A case or controversy exists between the parties requiring resolution by this Court.

Claims for Relief

Count I – Declaratory and Injunctive Relief:

FCRA Preemption of the Contra Costa Ordinance

48. Plaintiffs incorporate and reallege each and every allegation contained in paragraphs 1 to 47 of this Complaint as though fully set forth herein.

49. The FCRA expressly allows financial institutions to share with affiliates, without restriction, information that they obtain from their own transactions with the consumer, including information regarding the consumer's "credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living." 15 U.S.C. § 1681m(b)(1). The FCRA also expressly allows such institutions to share other information bearing on creditworthiness or relating to the aforementioned consumer characteristics – so called "non-experience information" – with their affiliates, provided that the institution gives the consumer the opportunity to "opt out" of such non-experience information sharing before it occurs. 15 U.S.C. § 1681a(d)(2). The FCRA does not impose any restrictions on the sharing of information not bearing on creditworthiness or related to the other listed consumer characteristics.

50. The FCRA provides that "[n]o requirement or prohibition may be imposed under the laws of any State . . . with respect to the exchange of information among persons affiliated by common ownership or common corporate control . . .," except for a specified Vermont statute in effect on September 30, 1996. 15 U.S.C. § 1681t(b)(2). This prohibition applies to local laws enacted before January 1, 2004. *Id.* § 1681t(d).

51. The Contra Costa Ordinance imposes "requirement[s] and prohibition[s] . . . with respect to the exchange of information among persons affiliated by common ownership or common corporate control" by, *inter alia*, providing for the requirement of a separate notice and the requirement of an opt-in before Plaintiffs can share information with affiliated entities.

52. The Contra Costa Ordinance accordingly is expressly preempted by 15 U.S.C. § 1681t(b)(2), and is unconstitutional under Article VI of the United States Constitution.

Count II – Declaratory and Injunctive Relief:

National Bank Act Preemption of the Contra Costa Ordinance

53. Plaintiffs incorporate and reallege each and every allegation contained in paragraphs 1 to 47 of this Complaint as though fully set forth herein.

54. Plaintiffs have the authority under the National Bank Act "to exercise all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24(Seventh). National banks' authorized powers under § 24(Seventh) include the power to advertise and market their authorized services.

55. OCC regulations implementing the National Bank Act provide that "[a] national bank may conduct in an operating subsidiary activities [including marketing activities] that are permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking." 12 C.F.R. § 5.34(e). Further, the OCC has provided by regulation that "[u]nless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." 12 C.F.R. § 7.4006.

56. The Contra Costa Ordinance prevents national banks from sharing confidential consumer information with all affiliates unless a consumer opts in to allow such sharing. Ordinance § 518-4.602. By restricting a national bank's ability to transmit through shared databases information about customers to affiliates who then market the Banks' own products and services, the Ordinance prevents or substantially interferes with the Banks' federally authorized power to advertise and market their own products to their own customers through their affiliates, for example the marketing of Plaintiff Banks' debit cards through the Credit Card Banks. Accordingly, the Contra Costa Ordinance conflicts with national banks' federally authorized powers under 12 U.S.C. § 24(Seventh).

57. The Contra Costa Ordinance has additional impacts on Wells Fargo. Unlike Bank of America, which operates its branches throughout the United States as part of a single corporate entity, the Wells Fargo banks are separately incorporated national banks for each of the more than 20 states in which Wells Fargo has branches. In some situations, one

Wells Fargo bank provides a service or product for all of the affiliated Wells Fargo banks. Thus, Wells Fargo Bank, N.A. provides the home equity loan products and Wells Fargo South Dakota, N.A. provides the student loan products for all Wells Fargo banks. The Ordinance's opt-in requirement would prevent Wells Fargo from using its common database to provide integrated, seamless service to customers throughout the United States. For example, Wells Fargo Nevada could not view the experience information in the Wells Fargo central database if a Contra Costa customer applied for a loan at a Nevada branch or came to the branch to cash a Wells Fargo check. In these circumstances, the Contra Costa customer would, therefore, be treated by the Wells Fargo Nevada bank as though he or she was not a Wells Fargo customer at all.

58. The opt-in restriction will also seriously impair Plaintiff Banks' federally authorized authority to engage in deposit taking and lending operations under 12 U.S.C. § 24(Seventh). Bank of America for many years has used a subsidiary, Bank of America Technology and Operations, Inc. ("BATO"), to handle all data processing and records storage for its accountholders. Wells Fargo similarly uses a single database (maintained by Wells Fargo Services Company ("WFSC")) that contains all of its experience information about its customers which is available to all affiliated Wells Fargo banks and other consumer financial affiliates. This experience information about particular customers cannot be separated by the Bank so that other affiliates receive it only for account maintenance purposes. The Banks accordingly would be effectively precluded from sending to BATO or WFSC information about Contra Costa customers that is used by the Banks for all of their Contra Costa customer contact and account functioning. Wells Fargo Bank faces greater problems regarding its utilization of WFSC since it is used by all affiliated national banks to provide core banking services to Contra Costa customers.

59. The Contra Costa Ordinance would also impair Plaintiff Banks from exercising their powers under 12 U.S.C. § 24(Seventh) and OCC regulations, 12 C.F.R §§ 5.34, 7.4006, to offer their Contra Costa customers and potential customers products and services indirectly through their subsidiaries and affiliates. Instead, the Ordinance would require the

Banks to do so directly or not at all. Plaintiff Banks would therefore be forced to offer products and services to their Contra Costa County customers that they otherwise would not offer (because, absent the Ordinance, they would only offer them through an affiliated or nonaffiliated third party), or would be prevented from offering such products and services to their Contra Costa customers through affiliates or third parties because of the information sharing restrictions of the Ordinance. For example, the Contra Costa Ordinance would prevent the Credit Card Banks, as national banks, from using Bank of America's and Wells Fargo Bank's Contra Costa customer names and addresses to market and sell credit card products and services on behalf of their respective Banks. Similarly, WFHM, an operating subsidiary of Wells Fargo Bank, could not use Wells Fargo Bank customer information to market and sell WFHM's products to Wells Fargo Bank customers, or to offer mortgage rate discounts to Wells Fargo Bank customers who maintain specified asset balances with the Wells Fargo franchise. If Wells Fargo Bank wanted to use such information to solicit such customers for a discount-rate mortgage, for example, it would have to offer such mortgages as its own product, rather than as a product of its operating subsidiary, WFHM. Similarly, the Wells Fargo South Dakota bank could not offer student loans to Contra Costa customers. In this regard, the Contra Costa Ordinance also conflicts with national banks' powers under 12 C.F.R. §§ 5.34 & 7.4006 and other OCC regulations to organize and operate in the corporate and organizational forms that national banks find most convenient and useful.

60. The Ordinance's separate notice requirements specific to Contra Costa County are different, more burdensome and likely to be more frequent than, the notice requirements Plaintiff Banks are required to follow for their nationwide operations. These requirements would disrupt Plaintiff Banks' operations. As such, the Ordinance impairs the exercise of national banks' powers under 12 U.S.C. § 24(Seventh).

61. The Ordinance would also impair the ability of Wells Fargo Bank Nevada as a national bank to sell, solicit and crossmarket insurance and certain other products and services to the Contra Costa customers of Wells Fargo Bank through "joint agreements" with other financial institutions, as it now does pursuant to 15 U.S.C. § 6802(b)(2). By subjecting

such joint agreements to a customer "opt in," the Contra Costa Ordinance would prevent or significantly interfere with the ability of national banks, like Plaintiff Wells Fargo Bank Nevada, to advertise and market to Contra Costa customers and potential customers through such agreements.

62. The Ordinance, insofar as it applies to Plaintiffs, as national banks and their operating subsidiaries, is therefore preempted under Article VI of the United States Constitution by the National Bank Act, 12 U.S.C. § 24(Seventh), as it is implemented by the OCC's regulations.

Count III – Declaratory and Injunctive Relief:

GLBA Insurance Provision Preemption of the Contra Costa Ordinance

63. Plaintiffs incorporate and reallege each and every allegation contained in paragraphs 1 to 47 of this Complaint as though fully set forth herein.

64. Section 104(d)(2)(A) of GLBA provides that "[i]n accordance with the legal standards for preemption set forth in the decision of the Supreme Court of the United States in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), no State may, by statute, regulation, order, interpretation, or other action, prevent or significantly interfere with the ability of a depository institution, or an affiliate thereof, to engage, directly or indirectly, either by itself or in conjunction with an affiliate or any other person, in any insurance sales, solicitation, or crossmarketing activity." 15 U.S.C. § 6701(d)(2)(A).

65. The Banks are depository institutions within the meaning of 15 U.S.C. § 6701(d)(2)(A). They are affiliated with their Insurance Affiliates and regularly share their customer names and addresses with their Insurance Affiliates in order facilitate the sale, solicitation and crossmarketing of insurance by their Insurance Affiliates.

66. The Contra Costa Ordinance prevents or significantly interferes with the ability of Plaintiff Banks to share such information and the ability of their Insurance Affiliates to engage in such insurance sales, solicitation and crossmarketing activities.

67. The Contra Costa Ordinance also prevents or significantly interferes with the ability of WFII and Wells Fargo Bank Nevada to sell, solicit and crossmarket insurance through joint agreements, as authorized by 15 U.S.C. § 6802(b)(2).

68. The Contra Costa Ordinance accordingly is preempted under Article VI of the United States Constitution by 15 U.S.C. § 6701(d)(2)(A).

Count IV – Declaratory and Injunctive Relief:

Preemption of Local Enforcement of the Contra Costa Ordinance

69. Plaintiffs incorporate and reallege each and every allegation contained in paragraphs 1 to 47 of this Complaint as though fully set forth herein.

70. The Contra Costa Ordinance subjects national banks to monetary liabilities and provides for administrative enforcement by local officials.

71. Under the National Bank Act, 12 U.S.C. § 484, and other provisions of the federal banking laws and OCC regulations, the OCC has exclusive regulatory and enforcement authority over Plaintiff Banks, and other national banks, with regard to their sharing of customer information with affiliates and nonaffiliated third parties as well as with regard to the customer information sharing notices of national banks.

72. The enforcement of the Contra Costa Ordinance is preempted under Article VI of the United States Constitution, insofar as it applies to national banks such as Plaintiff Banks, by 12 U.S.C. § 484 and other provisions of the federal banking laws and applicable OCC implementing regulations, because it conflicts with the OCC's exclusive enforcement authority over national banks with regard to their authorized products and services.

Count V – Attorneys' Fees:

Claim Under 42 U.S.C. § 1983

73. Plaintiffs incorporate and reallege each and every allegation contained in paragraphs 1 to 47 of this Complaint as though fully set forth herein.

74. Plaintiffs are granted federal rights under the FCRA, NBA, GLBA, and Article VI of the United States Constitution to share their customer information among affiliated

corporations, and nonaffiliated third parties free of state and local requirements, restrictions and prohibitions like those imposed by the Contra Costa Ordinance.

75. By adopting, implementing and enforcing the Contra Costa Ordinance, Defendants are thus depriving Plaintiffs of their federal rights under the FCRA, NBA, GLBA, and Article VI of the United States Constitution.

76. Defendants are "persons" under 42 U.S.C. § 1983 who have acted under color of state law to deprive Plaintiffs of rights secured by the federal Constitution and laws.

77. Plaintiffs have incurred attorneys' fees in pursuance of their claims that are recoverable from Defendants under 42 U.S.C. § 1988.

Prayer for Relief

WHEREFORE, Plaintiffs pray that this Court:

A. Enter a judgment declaring that the Contra Costa Ordinance Number 2002-30 (enacted Sept. 24, 2002), as amended by Contra Costa Ordinance Number 2002-44 (enacted Nov. 5, 2002) is null and void and unenforceable, insofar as it applies to Plaintiffs, as national banks, or national bank operating subsidiaries and/or affiliates, because it is preempted under Article VI of the United States Constitution as being (i) expressly preempted by the Fair Credit Reporting Act, and section 104 of the Gramm-Leach-Bliley Act of 1999, Pub. L. No. 106-102; and (ii) in conflict with the National Bank Act and implementing OCC regulations;

B. Enter a permanent injunction, Plaintiffs having no adequate remedy at law and suffering irreparable injury as a result of this unconstitutional local Ordinance, ordering Defendants to suspend the Ordinance, and otherwise enjoining Defendants, as well as any other person acting in the name of the Contra Costa County, or of the People of the State of California, from allowing the Contra Costa Ordinance to become effective, or enforcing or taking any action to enforce the Ordinance;

C. Should Plaintiffs so move, enter a preliminary injunction pending final resolution of this action, Plaintiffs having no adequate remedy at law and suffering irreparable injury as a result of this unconstitutional local Ordinance, ordering Defendants to suspend the Contra Costa Ordinance, and enjoining Defendants, as well as any other person acting in the name of the Contra Costa County, or of the People of the State of California, from enforcing or taking any action to enforce the Ordinance, pending further order of this Court;

D. Award Plaintiffs their reasonable attorneys' fees pursuant to 42 U.S.C. § 1988; and

E. Grant Plaintiffs such other and further relief, including costs, as the Court may deem just and proper.

E. EDWARD BRUCE
STUART C. STOCK
KEITH A. NOREIKA
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 662-6000
Fax: (202) 662-6291

Dated: December __, 2002

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RICHARD C. DARWIN (State Bar No. 161245)
COVINGTON & BURLING
One Front Street
San Francisco, California 94111
Telephone: (415) 591-6000
Fax: (415) 591-6091

ATTORNEYS FOR PLAINTIFFS